Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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NO. 87 743

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

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BENELLA CAMINITI; COMMITTEE FOR PUBLIC SHORELINES RIGHTS,
Petitioners,

v.

BRIAN J. BOYLE, Commissioner of Public Lands; ROBERT S. O'BRIEN, Treasurer of the State of Washington,
Respondents.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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# PETITION FOR WRIT OF CERTIORARI

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# PETITION FOR WRIT OF CERTIORARI

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## OPINION BELOW

The Supreme Court of the State of Washington denied petitioners' petition against Washington State officers which sought a writ of mandamus and a declaration

that Wash. Rev. Code 79.90.105 is unconstitutional and a violation of the Public Trust Doctrine. 107 Wn.2d 662, 732 P.2d 989 (1987).

## BASIS FOR JURISDICTION

On July 29, 1987, an Order Denying Petitioners' Motion For Reconsideration, which also denied Petitioners' Motion For Disqualification of Justices Pursuant to the 14th Amendment to the United States Constitution, was issued by the Hon. Vernon R. Pearson, Chief Justice of the Washington Supreme Court. This is the ruling for which petitioners seek review.[2] On the same date, the Acting Deputy Clerk of the Washington

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[2]A copy of this Order is contained in the Appendix submitted herewith, at page A-1, as is the lower court opinion, at pages A-6 through A-21.

Supreme Court, Mr. Stephen P. Helgeson, issued a Certificate of Finality. This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1257, specifically pursuant to subsection (3), which provides for review of a final state court decree by writ of certiorari:

> ... where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

The 14th Amendment to the United States Constitution provides, in pertinent part:

> Section 1 CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall

> abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Rev. Code 79.90.105 provides:

> The abutting residential owner to state-owned shorelands, tidelands, or related beds of navigable waters, other than harbor areas, may install and maintain without charge a dock on such areas if used exclusively for private recreational purposes and the area is not subject to prior rights. This permission is subject to applicable local regulation governing construction, size, and length of the dock. This permission may be revoked by the department [of Natural Resources] upon finding of public necessity which is limited to the protection of waterward access or ingress rights of other landowners or public health and safety. The revocation may be appealed as a contested case under chapter 34.04 RCW. Nothing in this section prevents the abutting owner from obtaining a lease if otherwise provided by law.

## STATEMENT OF THE CASE

On February 13, 1986, petitioners Benella Caminiti and the Committee for Public Shorelines Rights initiated an original action in the Washington Supreme Court, pursuant to Wash. Const. Art. 4, section 4, against Washington State officers Brian J. Boyle, the Commissioner of Public Lands, and Robert S. O'Brien, the Treasurer. Petitioners sought a writ of mandamus to prohibit the respondents from implementing or enforcing Wash. Rev. Code 79.90.105, a Washington statute enacted in 1983, which provides, in pertinent part:

> The abutting residential owner to state-owned shorelands, tidelands, or related beds of navigable waters, other than harbor areas, may install and maintain without charge a dock on such areas if used exclusively for private recreational purposes and the area is not subject to prior rights.

The pertinent agreed facts in the case, set forth in the opinion, 107 Wn.2d, at pp. 663-665, establish that, prior to the 1983 effective date of Wash. Rev. Code 79.90.105, approximately 370 owners of private land abutting public aquatic lands paid the State of Washington approximately $35,000.00 in annual rental for private recreational docks on public aquatic lands pursuant to the former statutory leasing program. After the effective date of the statute, the lease requirement was terminated. This elimination of lease fees may be a factor considered by abutting property owners in deciding whether to build a private recreational dock on abutting public lands.

Petitioners have financial interests in revenue generated from public aquatic lands, as well as property interests

in common with other residents in preserving the opportunity to use and enjoy undeveloped public aquatic lands and waters. These interests are impacted by the elimination of these revenues and by the presence and private use of private recreational docks on these public resources.

Petitioners sought invalidation of Wash. Rev. Code 79.90.105 on three grounds: (1) the statute is a gift of public property rights to a small group of private landowners which violates Wash. Const. Art. 8, section 5 because, by eliminating the former lease fee requirement for private docks, it grants free rights of exclusive use and occupancy; (2) the statute violates the Public Trust Doctrine because it disposes of public aquatic lands for strictly private benefit

with no compensation to the public[3]; and (3) the statute violates the Fourteenth Amendment to the United States Constitution as a special privilege which denies equal protection to petitioners and other members of the public who are not waterfront property owners.

After oral argument, the Washington Supreme Court issued its opinion on February 12, 1987, denying the relief sought. Caminiti, et al. v. Boyle, et al., 107 Wn.2d 662, 732 P.2d 989 (1987). By an 8-1 vote (Justice Dore dissenting), the Court rejected the constitutional and Public Trust

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[3]The Public Trust Doctrine, based on ancient Roman law and English common law, determines that the sovereign states hold the common aquatic lands and waters in trust for the use and benefit of the people. Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Shively v. Bowlby, 152 U.S. 1 (1894); Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892).

Doctrine arguments of the petitioners.[4]

Shortly after the decision petitioners obtained Conflict of Interest Statements which are required to be filed annually by each Washington Supreme Court justice under Washington's Public Disclosure Act, Wash. Rev. Code 42.17.010 et seq.

These Conflict of Interest Statements revealed that five justices owned residential waterfront property directly affected by Wash. Rev. Code 79.90.105, the statute at issue. Justices Brachtenbach, Durham, Pearson, Utter and Justice Pro Tem Schumacher were abutting owners to public aquatic lands who obtained free licenses under the statute to develop abutting public

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[4]Petitioners do not now seek review of the lower court decision on the merits, recognizing that key substantive issues are matters of state law.

aquatic lands exclusively for their own private purposes. Petitioners were not previously aware of this property ownership.

On March 3, 1987, petitioners submitted a Motion for Reconsideration of the court's decision, to which was attached an affidavit of counsel identifying copies of the justices' Conflict of Interest Statements, including the relevant property records. They sought reconsideration on the grounds of: (1) substantive incorrectness and (2) procedural invalidity because of the disqualifying waterfront property interests held by the five justices. The motion and the supporting affidavit of petitioner Benella Caminiti raised the issues that the Washington Supreme Court denied petitioners fundamental fairness and a fair hearing.

On April 3, 1987, petitioners

submitted a Motion For Disqualification of Justices Pursuant to the Fourteenth Amendment to the United States Constitution based on the facts set forth in the Motion for Reconsideration and based on additional due process case law, beyond that briefed in the Motion For Reconsideration.[5]

On July 29, 1987 Mr. Stephen P. Helgeson, the Acting Deputy Clerk of the Washington Supreme Court, issued a Certifi-

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[5]By letter dated October 8, 1987, petitioners requested the Clerk of the Washington Supreme Court to certify and transmit those pertinent portions of the post-decision record, in which the disqualification issue was raised and ruled on, to this Court pursuant to Supreme Court Rule 19.1. A copy of this letter is included in the Appendix at pages A-2 through A-4. the Washington Supreme Court Clerk complied with this request by letter of transmittal to the Clerk of this Court, dated October 19, 1987. The lower court's opinion does not reference the disqualification issue, therefore, the post-decision record is deemed essential to a proper understanding of the case by this Court.

cate of Finality which stated that no further review of the court's previously filed opinion had been requested. On the same day, the Honorable Vernon R. Pearson, Chief Justice of the Washington Supreme Court issued an order denying petitioners' Motion for Reconsideration which also denied petitioners' Motion for Disqualification of Justices Pursuant to the Fourteenth Amendment of the United States Constitution. A letter to petitioners' counsel from Mr. Helgeson, the Acting Deputy Clerk of the Court, dated August 28, 1987, confirmed that: "the Motion for Disqualification of certain justices was considered in conjunction with the Motion for Reconsideration and denied."

Thus, with reference to Sup. Ct. Rule 21.1(h), the federal question of denial of due process of law was

presented to, and passed on by, the Washington Supreme Court in its denial of the petitioners' post-decision motions.[6]

ARGUMENT IN SUPPORT OF PETITION

A. The Washington Supreme Court Denied Petitioners Due Process of Law Because Five of the Justices who Voted Against Petitioners Owned Waterfront Property Interests in Direct Conflict With the Relief Sought.

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[6]A copy of the letter of Mr. Helgeson is submitted herewith in the Appendix at page A-5. Even if the federal constitutional question regarding disqualification is assumed, arguendo, not to have been decided by the court below, under this Court's cases, refusal by a state court to decide a properly presented federal question which was necessary to the state court's disposition of the case before it, see generally NAACP v. Alabama, 377 U.S. 288 (1964), is similar in effect to a state court's silence on a federal question; neither operates to defeat this Court's jurisdiction. All that is required is that "the record should show a complete title under the [federal law invoked], and that the judgment of the [state] court is in violation" of that federal law. Hickie v. Starke, 26 U.S. (1 Pet.) 94, 98 (1828).

With reference to the considerations governing review on certiorari, Sup. Ct. Rule 17.1(c) is applicable here:

> When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The federal question is whether the conflicts of interest of the Washington Supreme Court justices identified compel their disqualification from the case under the Due Process Clause of section 1 of the 14th Amendment to the United States Constitution. The question of whether a state court has itself denied a federal constitutional right to a party is reviewable by certiorari, rather than by appeal. Supreme Lodge, Knights of Pythias v. Meyer, 265 U.S. 30

(1924).

The Washington Supreme Court decided the disqualification issue in conflict with this Court's holding in Aetna Life Insurance Co. v. Lavoie, 475 U.S. ___, 89 L.Ed.2d 823, 106 S.Ct. 1580 (1986). This Court unanimously held that the Due Process Clause requires disqualification of state court judges who have personal interests in the outcome of their decisions. In Aetna, Alabama Supreme Court Justice Embry was disqualified from an appeal involving a bad-faith action against an insurer, because he had similar bad-faith actions pending against other insurers. This Court vacated the 5-4 decision of the Alabama Supreme Court adverse to the insurer, and stated:

> We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in [Tumey v.

> Ohio, 273 U.S. 510 (1927), In Re Murchison, 349 U.S. 133 (1955) and Ward v. Village of Monroeville, 409 U.S. 57 (1972).] We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "would offer a possible temptation ... to the average [judge] ... [to] lead him not to hold the balance nice, clear and true." Ward, supra., at 60. ... The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice".

89 L.Ed.2d, at p. 835 (ellipses and brackets in original; citations omitted.)

The potential interest of Justice Embry in the outcome of the bad-faith judgment appeal was less immediate than the interests of the justices herein. Justice Embry had an indirect interest because the

result improved his position in his separate actions pending against a different insurer. Id., at p. 834. Here, the five justices had direct interests as waterfront property owners in upholding the constitutionality of the statute petitioners challenged. By upholding Wash. Rev. Code 79.90.105, they maintained a special private benefit to themselves. (See: dissenting opinion of Justice Dore, 107 Wn.2d, at p. 677.) Even assuming, arguendo, none of the Justices had yet obtained the fruits of the statute by owning, building, or expanding a dock rent-free, the desirability of their waterfront property, even if only held for investment purposes, was increased by their validation of this free property interest.[7]

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[7]For a case involving an analogous property interest of a judge leading to disqualification, see: Lindsay-Strathmore

The "appearance of justice" must be scrutinized, just as it was in Aetna, supra., 89 L.Ed.2d, at p. 837. To a great extent, petitioners' claims under the Washington Constitution and the Public Trust Doctrine

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Irrigation District v. Superior Court, 182 Cal. 315, 187 Pac. 1056 (1920). The trial judge owned a lot situated over groundwater which added value to the lot and the judgment sought by the plaintiffs in the action would have had the indirect effect of protecting the justice's interest in the groundwater although the judge had not previously used the groundwater, nor was any intent to do so alleged, 187 Pac., at p. 1059-60. The Supreme Court of California, while recognizing that there were thousands of people in the same position as the judge, id., and the minor potential side effect of the action on the judge's interests, id., at p. 1065, and acknowledging the difficulty and expense of retrying a long, complex case, nevertheless determined that: "the judicial acts and proceedings of Judge Wallace in said action must be deemed invalid and that the action must proceed again from the beginning before some judge who is not disqualified." Id. See also: State of California v. Kleppe, 431 F.Supp. 1344 (C.D. Cal. 1977) (stock ownership compelled disqualification).

turned on whether or not granting free rights to private upland owners to build and occupy docks over public aquatic lands serves any public purpose. The Court upheld the statute based on the following determination of that issue:

> The statute under review expresses a part of that [Shoreline Management Act, Chp. 90.58 RCW] policy; it is a practical recognition that one of the many beneficial uses of public tidelands and shorelands abutting private homes is the placement of private docks on such lands so homeowners and their guests may obtain recreational access to navigable waters.

107 Wn.2d, at p. 673.

Thus, five justices who obtained free rights to private use of public lands also decided that their private use would be "beneficial" to the public. Their conflicts of interest went to the very heart of the case. Sitting as the court of original

jurisdiction, if they had found no public benefit the statute would have been a gift of public property rights in violation of Article 8, section 5 of the Washington Constitution and the Public Trust Doctrine. (See: dissenting opinion of Justice Dore, supra.)

They would have been constitutionally required to pay compensation to the public treasury if they had an existing dock on public aquatic lands, or built one in the future. The relief petitioners sought directly conflicted with the justices' self-interest in maintaining their new, free rights to "wharf out" over public property.

Private rights in Washington's aquatic lands have been hotly-debated

throughout territorial and state history.[8] The appearance of injustice is aggravated by this historical circumstance. They violated the principle of In re Murchison, 349 U.S. 133, 136 (1955), that "no man is permitted to try cases where he has an interest in the outcome."

Even assuming, arguendo, the justices' conflicts were indirect and non-pecuniary, they still should have recused. Justice Brennan's concurring opinion in Aetna, supra., 89 L.Ed.2d, at p. 838, states:

> First, the Court stresses that Justice Embry's interest was "direct, personal, substantial, [and] pecuniary." ... I do not understand that by this language

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[8]For an analysis of the lower court decision in the context of Washington's history of aquatic land disputes, including strong criticism of the holding of the case, see: Allison, The Public Trust Doctrine in Washington, 10 Univ. of Puget Sound L. Rev. 633 (1987).

> the Court states that only an interest that satisfies this test will taint the judge's participation as a due process violation. Nonpecuniary interests, for example, have been found to require recusal as a matter of due process. See, e.g., In Re Murchison, supra., (judge who presided over a "one man grand jury" also presided over contempt proceedings relating to events which took place in the grand jury proceedings). Moreover, as this case demonstrates, an interest is sufficiently "direct" if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually attained in that proceeding.

(Citation omitted, brackets in original.) See: Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796, 800 (5th Cir. 1986) (vacating judgment because the trial judge had a non-pecuniary interest in the outcome of the proceeding as a member of the board of trustees of a university which

benefited indirectly by the decision).

Here, the outcome of the justices' participation substantially advanced the desirable goal of obtaining free property rights to exclusively occupy and use public aquatic lands. Justice in this case failed to "satisfy the appearance of justice" as required by Aetna, supra., 89 L.Ed.2d, at p. 837.

B. This Case Presents an Important Question of Due Process Law.

In Aetna, substantial attention was devoted to the fact that Justice Embry was the "deciding" fifth vote and author of the 5-4 decision adverse to the insurer. Id., at p. 836-837 (majority opinion); p. 837-840 (concurring opinions). In the present case, five Justices, i.e., the majority required

for the decision, had interests which mandated recusal.

But even if this Court determines that not all five were disqualified, Aetna does not stand for the proposition that the decision can stand. Id., at p. 836, fn. 4 (all consequences of disqualification of members of a multi-judge panel not definitively ruled on); p. 837-840 (opinion of concurring Justices Brennan, Blackmun and Marshall that decision would be vacated even if Justice Embry's vote had not been "deciding".) It appears that this Court will rule that subsequent disqualification of any member or members of a multi-judge court invalidates a decision regardless of the vote split. This case presents the opportunity, if the Writ is issued, to settle this important question of due process law. Sup.

Ct. Rule 17.1(c). It is vital that our appellate justices be held to strict constitutional requirements of disinterest.

Disqualification of all waterfront property-owning justices from this case will not make it difficult to obtain a judicial panel. There are numerous qualified judges in Washington who do not own waterfront property, thus this is not analogous to cases in which a judge is challenged for being a ratepayer or utility consumer, e.g., In re Virginia Electric Power Co., 539 F.2d 357 (4th Cir. 1976).

The Rule of Necessity may not be invoked to require a decision by these justices despite their conflicts of interest.[9] Under Wash. Rev. Code 2.04.170

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[9]See: Aetna, supra., 89 L.Ed.2d at p. 835, citing the Rule of Necessity with reference to United States v. Will, 449 U.S.

(portion not superceded by Washington's Rules of Appellate Procedure), the presence of at least five justices, and a concurrence of at least five justices present at the argument, are necessary to pronounce a decision of the Washington Supreme Court. Even if five justices are disqualified, a quorum may be obtained by the appointment of up to two justices pro tem under Wash. Sup. Ct. Admin. Rule 21(a). Cf.: Ex Parte Alabama Power Co., 196 So.2d 702 (Ala. 1967) (pursuant to petition, each justice of the Alabama Supreme Court ascertained and declared that he or she was disqualified to sit on the case; statutory procedure followed for constitution of a special court for decision.) The failure of the Washington Supreme Court to establish special

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200 (1980).

disqualification procedures such as Alabama's serves merely to evade public scrutiny and higher court review; it does not eliminate petitioners' due process right to a disinterested panel.

C. Petitioners Timely Raised the Federal Issue.

In Aetna, this Court recognized jurisdiction of the 14th Amendment due process claim, notwithstanding the fact that the motion for disqualification of Justice Embry was made after the Alabama Supreme Court's decision on the merits. The Court acknowledged that "appellant raised this issue as soon as it discovered the facts relating to Justice Embry's personal lawsuits." 89 L.Ed.2d, at p. 831. See: Leigh v. Green, 193 U.S. 79, 85 (1904) (though first raised and considered on motion

for rehearing in state court, federal question was within jurisdiction of the U.S. Supreme Court.)

The procedural situation here is the same as in Aetna. This Court should recognize jurisdiction of the federal due process issue raised in the post-decision motions for reconsideration and disqualification. Petitioners raised the issue as soon as they discovered the facts. They did not know, nor can they reasonably or fairly be expected to have known, of the waterfront property interests held by the five justices prior to their participation in the case. See also: Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796, 802, (5th Cir. 1986); Hall v. Small Business Administration, 695 F.2d 175, 179 (5th Cir. 1983).

## CONCLUSION

> The requirement of neutrality has been jealously guarded by this Court.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

This is not a case of speculative or contingent interests advanced by the five justices in question. They were the beneficiaries of the statute who determined that their own interests were equivalent to the public's interest. This relationship is too close to satisfy the "requirement of neutrality."

This Court should grant this Petition for Writ of Certiorari, then vacate the Washington Supreme Court decision and remand the case for consideration by a panel of justices who do not own waterfront property interests benefitted by Wash. Rev.

Code 79.90.105.

RESPECTFULLY SUBMITTED this 22nd day of October, 1987.

PETER T. JENKINS
Attorney for Petitioners
Caminiti and Committee For
Public Shorelines Rights

THE SUPREME COURT OF WASHINGTON

No. 52459-9

BENELLA CAMINITI, ET AL,

Petitioners,

v.

BRIAN J. BOYLE, ET AL,

Respondents.

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having decided by majority vote that the petitioners' motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 29th day of July, 1987.

/s/Vernon R. Pearson
Chief Justice

107 Wn.2d 662

A-2

THE SUPREME COURT

State of Washington

Reginald N. Shriver
Clerk

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Acting Deputy Clerk

Sixth Floor
Highways-Licenses Building
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Mail Stop AV-11
Olympia, WA 98504-0511

August 28, 1987

Mr. Peter Jenkins
Attorney at Law
4th & Blanchard Bldg
2121 4th Avenue - Suite 2300
Seattle, WA 98121

Re: Supreme Court No. 52459-9
Caminiti v. Boyle

Dear Mr. Jenkins:

This letter is in response to your telephone inquiry regarding the Certificate of Finality in the above entitled action. My review of the pleadings considered by the Court in the Motion for Reconsideration demonstrates that the Motion for Disqualification of certain justices was considered in conjunction with the Motion for Reconsideration and denied.

Very truly yours,

/s/
STEVEN P. HELGESON
Acting Deputy Clerk

SPH:lb

LAW OFFICE OF
PETER T. JENKINS
Fourth & Blanchard Building
2121 Fourth Avenue Suite 2300
Seattle, WA 98121
(206) 443-9586

October 8, 1987

Clerk, Washington State Supreme Court
Sixth Floor, Highways & Licenses Building
12th & Washington
MS: AV-11
Olympia, WA 98504

Re: Caminiti, et al. v. Boyle, et al.
Washington Supreme Court Cause No. 52459-9

Dear Clerk:

Pursuant to Rule 19 of the United States Supreme Court, this is a request for certification and transmission of certain portions of the record in the above-referenced Washington Supreme Court case to the United States Supreme Court. In particular, those portions of the record which should be certified and transmitted to the United States Supreme Court are as follows:

1. Petitioners' Motion For Reconsideration dated March 3, 1987, together with Exhibits A and B thereto, the affidavits of Peter T. Jenkins and Benella Caminiti, respectively, together with all documents attached to the affidavits.

2. Statement of Additional Authorities submitted in support of Petitioners' Motion For Reconsideration, dated March 18, 1987, together with the attachment thereto.

3. The Motion of Petitioners for Disqualification of Justices Pursuant to the Fourteenth Amendment of the United States Constitution, dated April 3, 1987.

4. Respondents' Answer to Petitioners' Motion For Reconsideration, dated April 1, 1987.

5. Order Denying Motion For Reconsideration, dated July 29, 1987 issued by the Court.

6. Certificate of Finality, dated July 29, 1987, issued by the Court.

7. The letter dated August 28, 1987, from Mr. Stephen P. Helgeson, acting Deputy Clerk of the Court, to Mr. Peter T. Jenkins, attorney at law, referencing this case, which states that the Motion For Reconsideration was considered in conjunction with the Motion

for Disqualification and denied.

It is important that this record be transmitted promptly. Please contact me immediately if you have any questions.

Very truly yours,

By /s/
Peter T. Jenkins

PTJ:sa
L00039

cc: Mr. Nixon Handy
Senior Assistant Attorney General

[No. 52459-9. En Banc. February 12, 1987.]

BENELLA CAMINITI, ET AL, *Petitioners*, v. BRIAN J. BOYLE, ET AL, *Respondents*.

[1] **Waters — Tidelands — State Ownership — Constitutional Provisions.** The state ownership of tidelands asserted in Const. art. 17, § 1 is the sovereignty and dominion aspect of ownership that is separate and distinct from the title aspect of ownership. The sovereignty and dominion aspect of tideland ownership is held by the State in trust for the public and cannot be conveyed or given away except where such conveyance promotes the interest of the public or does not substantially impair the public interest in the remaining tidelands.

[2] **Waters — Tidelands — State Ownership — Use for Private Docks — Validity.** RCW 79.90.105, which permits owners of residential property abutting state-owned tidelands to install and maintain private recreational docks on the tidelands without payment to the State, does not violate the state sovereignty and dominion over all tidelands asserted in Const. art. 17, § 1, the Const. art. 8, § 5 prohibition against lending of state credit, or the equal protection clauses of the state and federal constitutions.

[3] **Statutes — Validity — Presumption — Burden of Proof.** A statute is presumed to be constitutional and the burden of proof is on a party challenging the statute.

[4] **Constitutional Law — Equal Protection — Classifications — Rational Relationship — In General.** Legislative classifications not involving a suspect class nor a fundamental right are valid if there is a rational basis for distinguishing between those within and without the class.

DORE, J., dissents by separate opinion; GOODLOE, J., did not participate in the disposition of this case.

**Nature of Action:** Individuals and an organization

concerned with public use of tidelands sought extraordinary relief against state officers, challenging the validity of legislation permitting private recreational docks on state tidelands without charge.

**Supreme Court:** Holding that the legislation did not violate the public trust doctrine, and did not give away state credit or deny equal protection, the court *denies* the petition.

*Peter T. Jenkins*, for petitioners.

*Kenneth O. Eikenberry, Attorney General, Nixon Handy, Senior Assistant*, and *Ann C. Essko, Assistant*, for respondents.

ANDERSEN, J.—

FACTS OF CASE

This action was commenced by a petition filed in this court seeking a writ of mandamus directed to the Commissioner of Public Lands and the State Treasurer.[1] Petitioners ask us to declare unconstitutional the state statute (RCW 79.90.105) which allows owners of residential property abutting state-owned tidelands and shorelands to install and maintain private recreational docks on such lands without payment to the State. We concluded that the petition met the necessary criteria for retention by this court and retained original jurisdiction.[2] Having now considered the parties' briefs and oral argument on the merits, we decline to hold the statute unconstitutional. Issuance of the writ will be denied.

The case was submitted on agreed facts. Those pertinent to our disposition of the case are as follows:[3]

"By the Laws of the State of Washington of 1983, 2nd ex. sess., ch. 2, sec. 2, p. 2160 (formerly SB 3290; now codified

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[1]Const. art. 4, § 4; RAP 16.2.

[2]*See Tacoma v. O'Brien*, 85 Wn.2d 266, 268, 534 P.2d 114 (1975).

[3]Agreed Statement of Facts, paras. 5–10 (paragraph numbering deleted).

at RCW 79.90.105), the following legislation became effective on June 13, 1983:

> 'The abutting residential owner to state–owned shorelands, tidelands, or related beds of navigable waters, other than harbor areas, may install and maintain without charge a dock on such areas if used exclusively for private recreational purposes and the area is not subject to prior rights. This permission is subject to applicable local regulation governing construction, size, and length of the dock. This permission may be revoked by the department upon finding of public necessity which is limited to the protection of waterward access or ingress rights of other landowners or public health and safety. The revocation may be appealed as a contested case under chapter 34.04 RCW. Nothing in this section prevents the abutting owner from obtaining a lease if otherwise provided by law.'

"Prior to the effective date of RCW 79.90.105, approximately 370 residential owners of private land abutting public aquatic lands were paying the State approximately $35,000 in annual rental for private recreational docks on public aquatic lands, outside of harbor areas, pursuant to the then statutorily authorized leasing program. This amount includes all monies received by the Department of Natural Resources as lease application fees pursuant to RCW 79.01.088, RCW 79.90.100 and RCW 79.01.720. The administrative cost to the Department of Natural Resources of maintaining its leasing program for private recreational docks on public aquatic lands, outside of harbor areas, prior to the effective date of RCW 79.90.105 amounted to a substantial portion of the lease revenues.

"Since the effective date of RCW 79.90.105, the Department of Natural Resources has terminated the leasing program for private recreational docks on public aquatic lands, outside of harbor areas, and has not issued new leases or collected lease application fees or annual rental. The $35,000 in annual rental previously collected does not necessarily reflect the amount of annual rental that the State would have charged in succeeding years had RCW 79.90.105

never been enacted, which amount may have been more or less.

"Petitioner Caminiti has interests affected by the amount of revenue that the State generates each year from public resources.

"Petitioner Caminiti and the members of petitioner Committee for Public Shorelines Rights have recreational interests that are affected by their ability to acquire access to and use public aquatic lands and waters. These include, but are not limited to, their ability to fish, swim, navigate, water ski, beachcomb, procure shellfish, sunbathe, observe natural and undisturbed wildlife, play on open beaches, and enjoy seclusion. These interests are impacted to some extent by the presence, location, and private use of private recreational docks on these public aquatic lands and waters.

"The elimination of lease fees may be a factor considered by some upland owners in deciding whether to build a private recreational dock on abutting public aquatic lands, although it is not known to what extent this factor would actually influence such decisions."

There is one principal issue.

ISSUE

Does RCW 79.90.105, which allows owners of residential property abutting state-owned tidelands and shorelands[4] to install and maintain private recreational docks on such lands free of charge, violate article 17, section 1 of the Washington State Constitution or the "public trust doctrine"?

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[4]In addition to referring to state-owned shorelands and tidelands, RCW 79.90.105 also deals with "*related beds* of navigable waters, other than harbor areas . . ." (Italics ours.) Bedlands are those lands lying beyond the line of navigability of rivers and lakes and those lands beyond the low tide mark of tidal waters. RCW 79.90.050. Bedlands in tidal waters may present unique problems, particularly with respect to federal regulation of navigable waters. However, the parties have chosen to argue this case primarily with respect to tidelands and shorelands which, as a practical matter, are those principally involved. As a consequence, bedlands will not be separately dealt with herein other than to point out by this note that what we hold concerning tidelands and shorelands generally applies to bedlands as well.

DECISION

The short answer to the question posed by this issue is "no". Upon admission into the Union, the State of Washington was vested with title in, and dominion over, its tidelands and shorelands. Since statehood, the Legislature has had the power to sell and convey title to state tidelands and shorelands. Prior to 1971, when the Legislature by statute changed its policy, the State had sold separately 60 percent of its tidelands and 30 percent of its shorelands. The Legislature has never had the authority, however, to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands. By enacting the statute at issue in this case (RCW 79.90.105), the Legislature has seen fit to grant only a revocable license allowing owners of land abutting state-owned tidelands and shorelands to build recreational docks thereon subject to state regulation and control. The Legislature did not thereby surrender state sovereignty or dominion over these tidelands and shorelands, but through the Department of Natural Resources and local subdivisions of state government continues to exercise control over them.

[1] By our state constitution, "[t]he state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes . . ." Const. art. 17, § 1 (part). This was but a formal declaration by the people of rights which our new State possessed by virtue of its sovereignty,[5] and which declaration had the effect of vesting title to such lands in the state.[6]

As this court has repeatedly held, under the foregoing constitutional provision the State of Washington has the

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[5]*Robinson v. Silver Lk. Ry. & Lumber Co.*, 153 Wash. 261, 274, 279 P. 1109 (1929).

[6]*Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 331, 95 P. 278 (1908).

power to dispose of, and invest persons with, ownership of tidelands and shorelands subject only to the paramount public right of navigation and the fishery.[7] Perhaps the clearest exposition of the nature of the State's ownership in this regard is that contained in this court's opinion in the early case of *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 499, 64 P. 735 (1901):

> The title to lands under tide waters in the sea, arms, and inlets thereof, and in tidal rivers, within the realm of England, was, by the common law, deemed to be vested in the king, as a public trust, to subserve and protect the public right to use them as a common highway for commerce, trade, and intercourse. The king, by virtue of his proprietary interest, could grant the soil so that it should become private property; but his grant was subject to the paramount right of the public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right. Upon the American Revolution the title and dominion of the tide waters, and of the lands under them, vested in the several states of the Union within their respective borders, subject to the rights surrendered by the constitution to the United States.

And further:

> The provision of art. 17, § 1, of the constitution was evidently for the purpose of establishing the right of the state to the beds of all navigable waters in the state, whether lakes or rivers, or fresh or salt, to the same extent the crown had in England in the sea, and in the arms and inlets thereof, and in the tidal rivers, and to eliminate the distinctions existing under the rule of the common law in this respect.

*New Whatcom*, at 500.

The *New Whatcom* court also stated that

> the public has an easement in such waters for the purposes of travel, as on a public highway, which easement, as it pertains to the sovereignty of the state, is inalien-

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[7] *Hill v. Newell*, 86 Wash. 227, 231, 149 P. 951 (1915); *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 89, 102 P. 1041, 104 P. 267 (1909); *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127, 131–32, 94 P. 922 (1908); *Eisenbach v. Hatfield*, 2 Wash. 236, 240–43, 26 P. 539 (1891).

able and gives to the state the right to use, regulate, and control the waters for the purposes of navigation; . . .

*New Whatcom*, at 504.

From the foregoing it is clear that the State's ownership of tidelands and shorelands is not limited to the ordinary incidents of legal title, but is comprised of two distinct aspects.

The first aspect of such state ownership is historically referred to as the jus privatum or private property interest.[8] As owner, the state holds full proprietary rights in tidelands and shorelands and has fee simple title to such lands. Thus, the state may convey title to tidelands and shorelands in any manner and for any purpose not forbidden by the state or federal constitutions and its grantees take title as absolutely as if the transaction were between private individuals.[9] In the case before us, the State has not by this statute conveyed title to the land, but as will be discussed shortly, has given a revocable license only.[10]

The second aspect of the state's ownership of tidelands and shorelands is historically referred to as the jus publicum or public authority interest.[11] The principle that the public has an overriding interest in navigable waterways and lands under them is at least as old as the Code of Justinian, promulgated in Rome in the fifth century A.D.[12] It is also found in the English common law, from whence our own common law is derived, as early as the 13th cen-

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[8] *Eisenbach*, at 240.

[9] *Eisenbach*, at 244–45; *Sequim Bay*, at 131. *See Port of Seattle v. Oregon & W. R.R.*, 255 U.S. 56, 63, 65 L. Ed. 500, 41 S. Ct. 237 (1921); *Shively v. Bowlby*, 152 U.S. 1, 12–13, 38 L. Ed. 331, 14 S. Ct. 548 (1894). *See also Orion Corp. v. State*, 103 Wn.2d 441, 464, 693 P.2d 1369 (1985) (Utter, J., concurring).

[10] *See* 2 *American Law of Property* § 8.109 (1952); R. Cunningham, W. Stoebuck & D. Whitman, *Property* § 8.1 (1984); 1 A. Reeves, *Real Property* § 235 (1909).

[11] *Shively*, at 11.

[12] T. Cooper, *Institutes of Justinian* § 1 (2d ed. 1841).

tury A.D.[13] The concept is a part of the established common law of the United States[14] and, as set forth above, is stated with clarity in the seminal opinions of this court interpreting Const. art. 17, § 1.[15] This jus publicum interest as expressed in the English common law and in the common law of this State from earliest statehood, is composed of the right of navigation and the fishery.[16] More recently, this jus publicum interest was more particularly expressed by this court in *Wilbour v. Gallagher*, 77 Wn.2d 306, 316, 462 P.2d 232, 40 A.L.R.3d 760 (1969), *cert. denied*, 400 U.S. 878 (1970) as the right

> of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.

The state can no more convey or give away this jus publicum interest than it can "abdicate its police powers in the administration of government and the preservation of the peace."[17] Thus it is that the sovereignty and dominion over this state's tidelands and shorelands, as distinguished from *title*, always remains in the State, and the State holds such dominion in trust for the public. It is this principle which is referred to as the "public trust doctrine".[18] Although not always clearly labeled or articulated as such, our review of Washington law establishes that the doctrine has always

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[13] 2 *Bracton on the Laws and Customs of England* 39–40 (1968).

[14] *See Shively*, at 11–14; *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 456–59, 36 L. Ed. 1018, 13 S. Ct. 110 (1892).

[15] *See Hill*, at 231; *Grays Harbor Boom Co.*, at 90–91; *Sequim Bay*, at 130–31; *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 499–503, 64 P. 735 (1901); *Eisenbach*, at 240–41.

[16] *Shively*, at 13; *Hill*, at 231.

[17] *Illinois Central*, at 453.

[18] *See Illinois Central*, at 453; *Hill*, at 231.

existed in the State of Washington.[19]

The test of whether or not an exercise of legislative power with respect to tidelands and shorelands violates the "public trust doctrine" is found in the following language of the United States Supreme Court:

> The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.[20]

Accordingly, we must inquire as to: (1) whether the State, by the questioned legislation, has given up its right of control over the jus publicum and (2) if so, whether by so doing the State (a) has promoted the interests of the public in the jus publicum, or (b) has not substantially impaired it.

Before applying this test to the legislation before us, we first note that the requirements of the "public trust doctrine" are fully met by the legislatively drawn controls imposed by the Shoreline Management Act of 1971, RCW 90.58. *Portage Bay-Roanoke Park Comm'ty Coun. v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 4, 593 P.2d 151 (1979). As we observed in *Portage Bay*, that act by its terms provides as follows:

> It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of

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[19] *See* Johnson & Cooney, *Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters*, 54 Wash. L. Rev. 275, 285–87 (1979).

[20] *Illinois Central*, at 453.

navigation and corollary rights incidental thereto.

*Portage Bay*, at 4 (quoting RCW 90.58.020 (part)). In its listing of preferred uses, this same statute also provides that "[a]lterations of the natural condition of the shorelines of the state, in those limited instances when authorized, *shall be given priority for single family residences, . . . piers*, and other improvements facilitating public access to shorelines of the state, . . ." (Italics ours.) RCW 90.58.020 (part).[21]

RCW 79.90.105, which is set out at the beginning of this opinion, and the validity of which is here challenged, substantially accords with the objectives of the Shoreline Management Act of 1971 just noted, and is supplemental thereto. The authorization in the challenged statute (RCW 79.90.105) which allows owners of residential property abutting state-owned tidelands and shorelands to install and maintain private recreational docks on such lands without charge is, to use the phraseology of the Shoreline Management Act of 1971, neither unreasonable nor inappropriate.[22] As will be pointed out in more detail shortly, the statute does not permit "unmonitored and uncontrolled expansion and multiplication of private docks on public aquatic lands and waters"[23] as argued by petitioners, but to the contrary, any such construction is subject to substantial regulation and control.

**[2-4]** Turning next to the above stated test for violations of the "public trust doctrine", and applying that test to the questioned statute (RCW 79.90.105), we observe as follows.

Right of control. Petitioners argue that "[a] common thread in judicially-pronounced public trust doctrine tests is deciding whether the state has retained adequate control

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[21]*See Department of Ecology v. Ballard Elks Lodge 827*, 84 Wn.2d 551, 557, 527 P.2d 1121 (1974) (quoting this policy with approval).

[22]*See* RCW 90.58.020.

[23]Brief of Petitioners, at 39.

over trust resources."[24] We agree.

By enacting RCW 79.90.105, the Legislature has given up relatively little right of control over the jus publicum, and has not conveyed title to any state-owned tidelands or shorelands. The statute in question relates only to residential owners whose property abuts public tidelands or shorelands.[25] The statute does not apply to harbor areas which lie in navigable waters in front of and 1 mile on either side of incorporated cities which border navigable waters and where special constitutional and statutory limitations apply.[26] The enactment limits dock use to private recreational purposes, thus eliminating any commercial usage. The statute also specifically authorizes an agency of the State, the Department of Natural Resources, to regulate the docks through its powers of revocation to protect waterward access and ingress rights of other landowners and the public health and safety. As further specifically expressed in the statute itself, the docks are subject to local regulation governing construction, size and length of the dock. The construction of private recreational docks is also regulated by the Shoreline Management Act of 1971 which requires that a dock be constructed in a manner that is consistent with the policy of the act and the local guide-

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[24]Reply Brief of Petitioner, at 24.

[25]Until 1971, Washington had a liberal policy favoring the sale of tidelands and shorelands. This resulted in approximately 60 percent of the tidelands and 30 percent of the shorelands acquired at statehood being transferred to private ownership. K. Conte, *The Disposition of Tidelands and Shorelands, Washington State Policy 1889-1982*, at x (Nov. 1982) (Master's Thesis, The Evergreen State College). The State presently owns approximately 1,300 miles of tidelands and the amount of shorelines has not been determined. WAC 332-30-100. RCW 79.94.150, which became operative August 9, 1971, now prohibits all such sales except for limited sales of certain second class shorelands of navigable lakes. *See* RCW 79.94.210.

[26]*See* Const. art. 15; RCW 79.90.020. According to figures computed by the Department of Natural Resources, there are approximately 6,700 acres of constitutionally established harbor areas in the state (see WAC 332-30-100). *See generally* Johnson & Cooney, *Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters*, 54 Wash. L. Rev. 275 (1979).

lines, regulations or master programs promulgated under the act[27] and the planning enabling act which authorizes local zoning controls.[28] Although not expressly mentioned in the statute, state control also exists through the hydraulics act[29] and state flood control laws.[30] In Washington, abutting landowners have no riparian rights in state-owned tidelands and shorelands;[31] accordingly, the ultimate state control is that the Legislature having by this statute given abutting landowners the license to use its tidelands and shorelands, can likewise revoke that license by repealing the statute in the event it sees fit to do so. None of which is to mention the various federal and other controls over such docks which may be imposed pursuant to the commerce clause of the United States Constitution.[32]

Promotion of the interests of the public. The statute also promotes the interests of the public in the jus publicum, albeit to a limited degree. The Shoreline Management Act of 1971, discussed above, stresses that "coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest."[33] The statute under review expresses a part of that policy; it is a practical recognition that one of the many beneficial uses of public tidelands and shorelands abutting private homes is the placement of private docks on such lands so homeowners and their guests may obtain recreational access to navigable

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[27]RCW 90.58.140(1).

[28]RCW 36.70.

[29]*See* RCW 75.20.100.

[30]RCW 86.16.080.

[31]*Eisenbach v. Hatfield*, 2 Wash. 236, 249–53, 26 P. 539 (1891).

[32]U.S. Const. art. 1, § 8.

[33]RCW 90.58.020 (part).

waters. No expression of public policy has been directed to our attention which would encourage water uses originating on public docks, as they do, while at the same time discouraging any private investment in docks to help promote the use of public waters.

Impairment of the jus publicum. In any event, nothing in the statute substantially impairs the jus publicum. Private docks cannot, of course, block public access to public tidelands and shorelands, and the public must be able to get around, under or over them.[34] Recreational docks existed on public tidelands and shorelands before enactment of the statute, and still do; the principal difference being that under current statutory policy there is no obligation to pay rental or lease fees. As discussed above, the public ownership of such lands also remains unchanged; and state and local governments continue to regulate the construction of docks thereon, as does the federal government in some situations.

Lastly in this connection, respondent public officials argue as follows:

> RCW 79.90.105 was passed to rectify an unfair situation. Responsible landowners who voluntarily entered into a state lease were penalized by paying a lease fee. The vast majority of landowners who refused to come forward were rewarded by free use of state property. Despite efforts by [the Department of Natural Resources] to achieve greater compliance, the leasing program in practical terms was unenforceable.[35]

While there is some support for the foregoing explanation of the background of this statute in the history of state tideland and shoreland disposition policy[36] and the record herein, it is unnecessary for us to opine either as to the

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[34]WAC 332-30-144(4)(d).

[35]Brief of Respondents, at 67.

[36]*See generally* K. Conte, *The Disposition of Tidelands and Shorelands, Washington State Policy 1889-1982* (Nov. 1982) (Master's Thesis, The Evergreen State College).

accuracy of this explanation or its merits. Suffice to say, based on the law set forth herein, the Legislature was the appropriate forum in which to do battle on that issue, and the Legislature's decision to enact the statute in question was an entirely appropriate one for it to make.

The enactment of RCW 79.90.105 by the Legislature did not violate either the "public trust doctrine" or article 17, section 1 of our state constitution relating to state tidelands and shorelands. We also observe that the legislation enacted here is a far cry from that confronting the United States Supreme Court in the leading "public trust doctrine" case of *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 36 L. Ed. 1018, 13 S. Ct. 110 (1892). In that case, the Illinois Legislature had not only sold all of the land under one of the world's largest harbors (the Harbor of Chicago) to a private railroad company, but had also surrendered all right to control the harbor. There it was held that by so doing the Illinois Legislature had abdicated state sovereignty and dominion over the jus publicum; here, the Washington Legislature has not abdicated state sovereignty or dominion over the jus publicum.

The remaining issues may be more succinctly dealt with.

Petitioners also argue that the statute violates Const. art. 8, § 5, one of the "lending of credit" provisions of the state constitution, which reads:

> Credit Not To Be Loaned. The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation.

We have consistently held that a statute is presumed to be constitutionally valid and that the burden of overcoming such presumption is upon the party challenging the statute.[37] As above discussed, RCW 79.90.105 is by way of a revocable license allowing owners of land abutting state-owned tidelands and shorelands to use such lands for rec-

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[37]*See Public Empl. Relations Comm'n v. Kennewick*, 99 Wn.2d 832, 836, 664 P.2d 1240 (1983); *In re Marriage of Johnson*, 96 Wn.2d 255, 258, 634 P.2d 877 (1981).

reational docks, subject to numerous state and local controls. There is no loss of state money or credit inasmuch as no debt has been created by the statute.[38] Nor can it be said that there has been a gift of state money or property, since no donative intent is present.[39] Clearly also, the statute does not subsidize private enterprise, jeopardize state assets, expend state moneys or abdicate state control over state property.[40] Petitioners have not sustained their heavy burden of proof on this issue.

Petitioners also claim that the statute violates the equal protection clauses of the federal and state constitutions. The Fourteenth Amendment and the state privileges and immunities clause, Const. art. 1, § 12, contain substantially identical protections in this regard.[41] In this connection, petitioners contend that the statute impinges on their constitutional right to travel and therefore the statute must be judged under a strict scrutiny/compelling state interest test. Although the right to travel is fundamental, a challenged statute must have a certain "amount of impact" on the ability of a person to travel between and among the states before the strict scrutiny test is triggered.[42] There is no such impact here. In any event, as discussed herein, there is nothing in the statute or its application which restricts the public's right to walk over, or otherwise appropriately use, state tidelands and shorelands. There is no interference with petitioner's right to travel.

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[38]*See State ex rel. Graham v. Olympia*, 80 Wn.2d 672, 676, 497 P.2d 924 (1972).

[39]*See Louthan v. King Cy.*, 94 Wn.2d 422, 428, 617 P.2d 977 (1980). *See generally* Spitzer, *An Analytical View of Recent "Lending of Credit" Decisions in Washington State*, 8 U. Puget Sound L. Rev. 195, 195–99 (1985).

[40]*See Johnson*, at 264–68.

[41]*Equitable Shipyards v. State*, 93 Wn.2d 465, 476, 611 P.2d 396 (1980).

[42]*Macias v. Department of Labor & Indus.*, 100 Wn.2d 263, 273, 668 P.2d 1278 (1983). *See* 2 Rotunda, Nowak & Young, *Treatise on Constitutional Law: Substance and Procedure* § 18.38, at 680 (1986).

The rational basis test is used in situations, such as here, where a legislative classification involves neither a suspect class nor a fundamental right.[43] The statute refers to all owners of residential property abutting state–owned tidelands and shorelands. The fact that only owners of land adjoining state tidelands and shorelands own land from which docks can be built out onto such state lands is a rational basis for distinguishing them from others. We perceive nothing inherently unreasonable about the state Legislature allowing adjoining landowners, their tenants and invitees, to cross state–owned tidelands and shorelands in order to gain access to navigable waters for recreational purposes. Applying rational scrutiny to the legislation in question, we conclude that it does not violate constitutional equal protection guaranties.[44]

The petitioners not having prevailed herein, we do not address the various bases on which they claim attorneys' fees.

The writ petitioned for is denied.

PEARSON, C.J., UTTER, BRACHTENBACH, DOLLIVER, CALLOW, and DURHAM, JJ., and SCHUMACHER, J. Pro Tem., concur.

DORE, J. (dissenting)—I believe that RCW 79.90.105 violates Const. art. 8, § 5, which prohibits the State from lending credit or giving gifts to private parties. The grant of free use of state tidelands and waterways to private parties to maintain private recreational docks confers no benefit to the State, and constitutes an impermissible gift. I would hold RCW 79.90.105 is therefore unconstitutional, and I would grant the petitioners' writ of mandamus compelling the State not to enforce the statute.

Const. art. 8, § 5 provides:

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[43] *Myrick v. Pierce Cy. Comm'rs*, 102 Wn.2d 698, 701, 677 P.2d 140, 687 P.2d 1152 (1984).

[44] *See Equitable Shipyards*, at 478.

> The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation.

This section has been interpreted to mean that the State cannot either lend credit or give a gift of state funds to a private individual. *See, e.g., Adams v. UW*, 106 Wn.2d 312, 722 P.2d 74 (1986); *State Hwy. Comm'n v. Pacific Northwest Bell Tel. Co.*, 59 Wn.2d 216, 367 P.2d 605 (1961).

Recently in *Adams v. UW, supra*, we held that the key factor in constitutional gift analysis is consideration. Clearly, by allowing private individuals to use the land to build docks, the State has transferred a valuable property right. *See, e.g., New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 P. 735 (1901). The State has not received anything valuable in return, which makes this transfer an impermissible gift.

The respondents contend the State does receive consideration in that the private dock statute promotes a public interest. Namely, new jobs in constructing docks and new access to navigable waters for some private citizens result from RCW 79.90.105. I believe these contentions are unreasoned, unpersuasive, and cannot be the basis of an unconstitutional grant of the people's property, which has up to now been safeguarded and protected by our judicial system.

A statute conferring benefit to private interests is constitutional only in cases in which the benefit is incidental to a public purpose served by the statute. *Public Empl. Relations Comm'n v. Kennewick*, 99 Wn.2d 832, 664 P.2d 1240 (1983). The benefit to the public in this case is nonexistent; the only benefits arising from this statute go to private individuals. Furthermore, even if a remotely speculative benefit accrues to dock builders, a statute enacted for a public purpose will be held invalid if the property is given to a private person for which the public neither expects nor receives consideration. *Ackerley Communications, Inc. v. Seattle*, 92 Wn.2d 905, 918, 602 P.2d 1177 (1979), *cert. denied*, 449 U.S. 804 (1980).

## CONCLUSION

I dissent to the majority's decision. There is no public benefit arising from RCW 79.90.105. It is not disputed that the effect of the statute is to give away, for free, valuable state property. This gift is prohibited by Const. art. 8, § 5, and I would issue a writ of mandamus preventing state officials from implementing a blatantly unconstitutional statute.

Supreme Court, U.S.
FILED
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CLERK

No. 87-743

IN THE

# SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1987

BENELLA CAMINITI, COMMITTEE FOR PUBLIC SHORELINES RIGHTS,
*Petitioners,*
v.
BRIAN J. BOYLE, COMMISSIONER OF PUBLIC LANDS; ROBERT S. O'BRIEN, TREASURER OF THE STATE OF WASHINGTON,
*Respondents.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 87-743

IN THE

# SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1987

BENELLA CAMINITI, COMMITTEE FOR PUBLIC SHORELINES RIGHTS,
*Petitioners,*
v.
BRIAN J. BOYLE, COMMISSIONER OF PUBLIC LANDS; ROBERT S. O'BRIEN, TREASURER OF THE STATE OF WASHINGTON,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

## I. STATEMENT OF CASE

### A. Procedural History.

In 1982, the Washington State Legislature passed Wash. Rev. Code 79.90.105 which allows residential owners to construct private recreational docks on public aquatic lands abutting their property without payment of lease fees to the state.[1] Prior to passage of this statute, a residential waterfront

[1] 1982 Wash. Laws, 1st ex. s. ch. 21, §16.

owner was required by state land management policies to pay lease fees for a recreational dock located on state-owned aquatic land, although those policies were by no means uniformly enforced statewide. [2]

The principal feature of the 1982 statute is the elimination of lease fees. Both before and after passage of the statute, federal, state and local governments regulated dock construction through various police power measures.[3] In addition, the state retains the right to regulate dock construction through various lease provisions.[4]

On February 21, 1986, petitioners filed an original action in the Washington State Supreme Court seeking a Writ of Mandamus to prevent state officers from enforcing Wash. Rev. Code 79.90.105. The case was briefed and argued on an agreed statement of facts. On February 13, 1987, the State Supreme Court issued its decision denying petitioner's Writ of Mandamus and upholding the constitutionality of Wash. Rev. Code 79.90.105.

After receipt of the adverse ruling, petitioners filed a motion for reconsideration on March 3, 1986 and a motion for disqualification of justices on April 3, 1986. Petitioners' motions raised for the first time issues relating to disqualification of five

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[2] Pet., A-18, 19. 107 Wn.2d at 674-5. Respondents below noted that while approximately 40,000 docks existed on navigable lakes statewide, only about 370 docks were under state lease. It was the state's effort to bring about greater compliance which resulted in passage of Wash. Rev. Code 79.90.105. 107 Wn.2d at 674-5.

[3] The federal government exercises regulatory control over recreational docks through the Commerce Clause, the navigational servitude and the Rivers & Harbors Act, 33 U.S.C. §403 *et seq.* The state exercises regulatory control over recreational docks through the Shoreline Management Act (ch. 90.58 Wash. Rev. Code), the Hydraulics Act (Wash. Rev. Code 75.20.100) and the flood control laws (Wash. Rev. Code 86.16.080). Local governments control recreational docks through the Shoreline Management Act and zoning under the Planning Enabling Act (ch. 36.70 Wash. Rev. Code). The state regulates recreational docks under Wash. Rev. Code 79.90.105 through powers of revocation to protect waterward access, ingress rights, the public health and safety. Wash. Rev. Code 79.90.105 itself regulates recreational dock construction by limiting coverage to only abutting residential owners, excluding harbor areas, and by limiting use to private recreational. Finally, the statute only authorizes a license to use state property, which license may be revoked at any time by the Legislature. Pet., A-17, 107 Wn.2d at 673.

[4] Wash. Rev. Code 79.90.105. The statute only eliminates lease *fees*.

members of the court. Petitioners alleged these five justices were waterfront property owners who benefited from the ruling upholding the statute's constitutionality. Respondents submitted authorities in opposition to the motions.

On July 29, 1987, the State Supreme Court, after considering the record and authorities submitted denied petitioners' motions for reconsideration and disqualification. On October 27, 1987, petitioners filed this petition for certiorari.

B. **Factual Record.**

In support of their motions, petitioners submitted conflict of interest statements which showed only that five justices owned waterfront property in 1985. In response, the state stressed that petitioners' factual allegations were inadequate to raise the disqualification issue in two major respects.

First, the conflict of interest statements submitted by petitioners had been filed with the state in 1986 and only showed property ownerships held in 1985, the year before this case was filed.[5] Thus, the record currently before this Court contains no evidence that any justice held any waterfront property interest while this case was pending before the state court.

Second, even assuming waterfront ownerships were held during pendency of the case, petitioners failed to submit evidence that waterfront ownerships were of a type affected by the statute. Not all waterfront owners are affected by the statute which is quite limited in scope. The statute affects only (1) residential owners (2) who abut state-owned aquatic land (3) other than harbor areas (4) where the use is exclusively for private recreational purposes and (5) where the area is not subject to prior rights.[6]

Thus, the statute does not affect, for example, a waterfront owner (1) who does not reside on the upland property or whose

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[5] Wash. Rev. Code 42.17.240 requires all judges to file a Conflict of Interest Statement with the Public Disclosure Commission. The Conflict of Interest Statement is filed annually between January 1 and April 15 and discloses financial interests held in the previous calendar year. The 1986 statements disclose financial interests held by the justices in 1985, the year before this case was filed. The various statements submitted by petitioners were filed between January 21 and April 10, 1986 and disclosed ownerships held in 1985.

[6] Wash. Rev. Code 79.90.105.

upland ownership is held for business, commercial or investment purposes; or (2) whose ownership abuts privately owned aquatic lands; or (3) whose ownership abuts state-owned aquatic land in a harbor area;[7] or (4) where dock use is in part for a nonprivate recreational purpose; or (5) where the abutting public aquatic land is subject to prior rights, such as an existing state lease or authorized use. In short, there are at least five conditions, all of which must be met, for the statute to be triggered.

The factual record of this case does not establish if any justice held waterfront property while the case was pending nor, assuming a waterfront ownership was so held, whether any of the five conditions were met.

C. **Factual Categories.**

Assuming that some justices owned waterfront property while this case was pending, four categories of potential fact situations may exist, and in only two of these could a conflict even arguably exist.

1. **Waterfront Owner—Statute Not Applicable.**

As previously noted, not all waterfront property owners are affected by the challenged statute. Wash. Rev. Code 79.90.105 allows a residential waterfront owner to construct a dock on public aquatic lands adjacent to his ownership for private recreational purposes. The statute does not apply to aquatic land which is privately owned,[8] to waterfront property held for business or investment purposes, or to any owner other than a residential owner. Thus, a waterfront owner is affected by the statute only if he or she owns upland property abutting public aquatic lands as a residential owner.

2. **Statute Applicable—Dock Construction Not Possible.**

Waterfront property abutting public aquatic land may not always be suitable for dock construction notwithstanding Wash.

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[7] Under Wash. Const., art. 15, all harbor areas are in state ownership and under the jurisdiction of the State Harbor Line Commission.

[8] Aquatic land may be privately owned in two situations: (1) the state may have sold the tide or shorelands to a private party or (2) the body of water may not be navigable. The state only claims title to the beds and shores of navigable bodies of water. Wash. Const. art. 17. The beds and shores of nonnavigable bodies of water are typically owned by the abutting upland owners.

Rev. Code 79.90.105. The State Shorelines Act may prohibit dock construction in an area for environmental reasons.[9] High bluff property may drop into deep water where dock construction is not possible. Expansive tide flats may make dock construction impossible. The navigational servitude could prevent dock construction.[10] In these situations, dock construction while permissible by Wash. Rev. Code 79.90.105 may not actually be possible for other reasons.

3. **Statute Applicable—Dock Construction Possible But Not Practicable.**

Dock construction may be possible, but not desirable or practicable.

Recreational docks are commonplace in Washington's popular recreational lakes. Dock construction in these lakes is feasible because of sheltered weather, shallow banks, soft bed, and a constant water depth.

Very few private recreational docks exist, however, on saltwater, *i.e.*, on the Pacific Ocean or Puget Sound. Dock construction on Puget Sound particularly is complicated by an eighteen foot tide, high banks, rapid drop-offs, expansive tideflats and exposed weather and water conditions. Construction of a Puget Sound dock requires a substantial investment, industrial equipment, heavy materials and a suitable location.

Thus, while Puget Sound waterfront owners may take advantage of a rent-free dock under Wash. Rev. Code 79.90.105, in most instances no reasonable person would seriously consider the financial and regulatory undertaking necessary to construct such a dock, especially where the use is limited to private recreational purposes.[11]

Few private recreational docks exist on Washington's navigable rivers. As a practical matter, construction of a dock on

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[9] Ch. 79.90 Wash. Rev. Code.

[10] A dock would not be permitted to obstruct, for example, a navigable river used in interstate commerce.

[11] Respondents do not suggest that private recreational docks do not exist on Puget Sound. Such docks do exist in various sheltered bays and inlets where conditions are suitable, i.e., Gig Harbor, Eagle Harbor, Friday Harbor, Deer Harbor and West Sound. These docks are, however, the exception not the rule.

a river is seldom necessary or desired. Canoes, kayaks and rafts are typically lifted into a river and larger boats use public ramps.

**4. Statute Applicable—Existing Dock.**

A justice may own waterfront property abutting public aquatic land outside a harbor area with a private recreational dock. Wash. Rev. Code 79.90.105 applies to this situation. The dock is rent-free and does not require a state lease under Wash. Rev. Code 79.90.105. If the statute is invalid, the dock owner may be required to obtain a state lease with a rental payment.[12]

## II. SUMMARY OF ARGUMENT

An adequate factual record has not been established in this case. The record does not establish whether any justice held a disqualifying property interest while the case was pending before the state court; nor does it establish whether any waterfront ownership interest held could be affected by the statute. Based upon the current record, this Court may only speculate as to the various interests of members of the state court.

This Court should not grant certiorari and remand for development of a factual record. Petitioners raised this issue in the eleventh hour and only after an adverse ruling by the State Supreme Court. The information submitted could have been submitted prior to briefing, argument and decision by the state court. More and complete data could have been compiled from available public records if a truly objectionable conflict could be identified.[13] Petitioners' post-decision fishing expedition is inappropriate and should not be blessed by this Court. If an objectionable conflict exists, petitioners could have established the necessary record in a timely and appropriate fashion.

Even assuming that some justices owned waterfront property while the case was pending, and further assuming that those ownerships were potentially affected by the statute, disqualification for constitutional due process reasons is highly doubtful.

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[12] This is Washington State's long-standing policy as a landowner of requiring a lease and rent for recreational docks. No provision of law specifically requires obtaining a lease or payment of rent.

[13] Property ownerships are a matter of public record in Washington State and are on file in county auditor offices statewide.

Under the first two categories discussed above, where the statute either does not apply or where the statute does apply but dock construction is not possible, no viable theory exists to require judicial recusal. Accordingly, these two factual categories are not discussed further in this brief.

Under the latter two categories, where either the statute applies and dock construction is possible or where a dock actually does exist, the need for judicial recusal is highly doubtful. Constitutional due process requires judicial disqualification only for direct, personal, substantial and pecuniary interests in a case. Any financial interest in these situations is neither direct nor substantial; they are contingent on future events and insubstantial in value.

Petitioners' whole argument is built upon assumptions. Based on the record, this Court is forced to speculate about judicial disqualification. The justices of the state court have already considered their property interests in the context of this case and determined judicial recusal is not necessary or appropriate for the reasons discussed in this brief.

## III. ARGUMENT

### A. The Factual Record Does Not Support Petitioners' Arguments For Disqualification.

Petitioners argue that a justice who owns waterfront property should be disqualified from ruling on the validity of Wash. Rev. Code 79.90.105. Not all waterfront owners are affected, however, by operation of that statute. Only waterfront owners who fall within the statute's narrowly prescribed categories are affected. Two examples suffice to illustrate this point.

*Example.* Justice A owns a waterfront home on Lake Washington and maintains a private recreational dock extending out into the lake. Justice A, however, or his predecessor in interest, has acquired ownership of the shorelands abutting his upland property from the state. If the dock is on his privately owned shorelands, Justice A, although a private residential waterfront landowner who uses his dock exclusively for private recreational uses, is unaffected by operation of the statute.

*Example.* Justice B owns upland waterfront property in Puget Sound which abuts state-owned aquatic lands. The state-

owned aquatic lands, however, are located in a constitutionally established harbor area.[14] Justice B is a private residential waterfront landowner who abuts state-owned aquatic land but does not benefit in any way from Wash. Rev. Code 79.90.105.

The foregoing examples illustrate only two of the many situations in which a waterfront landowner may not benefit from the statute. By failing to establish a factual record necessary to analyze these situations, the Court is left only to speculate about the various interests of the members of the state court.

Petitioners did not raise the disqualification issue until after an adverse ruling on the merits had been issued. The information was just as available before briefing, argument and decision by the state court. More information is available on the public record regarding property ownerships and could have been obtained by petitioners. Petitioners' eleventh-hour motion for disqualification made after an adverse ruling and without supporting documentation or specific allegations is an ill-conceived fishing expedition which this Court should not condone or encourage. Petitioners had their opportunity to develop an adequate record and present it to the court in a timely and appropriate manner and have failed to do so.

B. **Constitutional Due Process.**

The due process clause of the Fourteenth Amendment is violated when a judge has a direct, personal, substantial and pecuniary interest in the case. The three leading Supreme Court decisions are discussed below.

**Tumey v. Ohio**, (1926).[15] In **Tumey**, the issue was presented in the context of the criminal justice system. The compensation of a judge in a small Ohio village was dependent in part upon convictions obtained. For each conviction, money was placed in a fund used to compensate the judge. No money was placed in the fund for a dismissal or acquittal. The Supreme Court held that the judge had a direct, personal, pecuniary interest in convicting the defendant:

> But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of

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[14] Wash. Const. art. 15. See also n. 7, supra.

[15] 273 U.S. 510 (1926).

> law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

273 U.S. at 523. In **Tumey**, the judge had a direct financial interest in convicting criminal defendants.

**In re Murcheson**, (1955).[16] In this case, a judge served as a "one-man grand jury". After the proceeding, the judge required a witness to show cause why he should not be punished for criminal contempt for his conduct and false testimony. The judge tried and convicted the defendant for contempt. The Supreme Court reversed. The due process requirement of an impartial tribunal was violated when the same judge presided at both proceedings:

> A fair trial in a fair tribunal is a basic requirement of due process. . . . our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

349 U.S. at 136. In **Murcheson**, the personal liberty of a defendant was directly at stake.

**Aetna v. Lavoie**, (1986).[17] This 1986 Supreme Court decision vacated a 5-4 Alabama Supreme Court ruling on due process grounds when one of the five justices in the majority failed to recuse himself. When Aetna paid only $1,650 of a $3,028 hospital bill, the insured sued for bad faith failure to pay. The jury awarded $3.5 million in punitive damages against Aetna. The Alabama Supreme Court upheld the award in a 5-4 decision. Justice Embry, who wrote the majority opinion, did not disclose the bad faith failure to pay lawsuits he had previously filed and had pending against two other insurance companies.

In the first case, Justice Embry had sued Maryland Casualty for failing to pay for the loss of a mink coat. In the second case, Justice Embry had filed a class action against Blue Cross for failure to pay claims of state employees. The class consisted of all state employees including all Alabama Supreme Court Justices.

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[16] 349 U.S. 133 (1955).

[17] 475 U.S._____, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1986).

The Supreme Court held Justice Embry had a direct, personal, substantial, and pecuniary interest in the **Aetna** decision: the increased settlement value of his two cases. But the Court held that any interest the remaining members of the Court had as a member of the class action was highly speculative and contingent.[18]

**Conclusions.** In the first two factual categories presented, where the statute either does not apply or where the statute does apply but dock construction is not possible, no viable theory exists to require judicial recusal. Applying these constitutional principles to the two remaining factual categories, this court should conclude as follows.

Constitutional due process requires judicial disqualification only where there exists a direct, personal, substantial and pecuniary interest in the subject matter of a case. In neither of the factual categories presented, where a dock now exists or where one could be built, does the due process standard apply. Any financial interest in these situations is neither direct nor substantial.

The financial interest is not direct because it is contingent on future events. In the situation where a dock currently exists, financial interest is contingent upon Natural Resources even requiring a lease and rent. If Wash. Rev. Code 79.90.105 were declared unconstitutional, no provision of law would require the state to obtain a lease or charge rent. This has simply been long-standing state aquatic land management policy which by no means has been uniformly enforced.

Where a dock does not exist but could be built, financial interest is contingent in three respects. First, it is contingent on the landowner even wanting a dock. If a landowner does not want a dock, he certainly does not have a financial interest at stake.

Second, financial interest is contingent upon the landowner being able to and actually obtaining all necessary federal, state and local permits. A dock which may be built today might not necessarily be allowed at some future time.

Third, the financial interest is contingent upon the land-

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[18] 89 L. Ed. at 836.

owner investing a substantial amount of money to build the dock. Ironically, the landowner must spend many thousands of dollars in order to save approximately $100 a year in annual rent. This is not the type of direct financial interest contemplated by constitutional due process.

Finally, the interest is not substantial. In **Aetna**, Justice Embry received a $30,000 settlement in one of the cases. A future and contingent annual dock rental of approximately $100 per year is not the type of substantial interest which requires judicial disqualification under the due process clause.[19]

The foregoing discussion has been limited to the constitutional due process requirements for judicial disqualification. As noted by this Court in **Aetna**, the due process clause marks only the outer boundaries of judicial disgualification. Congress and the states may impose more rigorous standards.[20] The only issue presented to this Court, however, is based upon constitutional due process.

## IV. CONCLUSION

Petitioners' case is built only upon assumptions. Rather than speculating about petitioners' unsupported allegations, this Court should more properly exercise deference to the decision of the State Supreme Court justices who duly considered their financial interests and determined judicial recusal was not required for the reasons discussed herein. This Court should deny the petition for certiorari.

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[19] The record in this case indicates that prior to the effective date of Wash. Rev. Code 79.90.105, the state had approximately 370 private recreational docks under lease for a total annual income of approximately $35,000, or an average of about $100 per year per dock. The record also shows that the state expended nearly this amount in administrative costs to administer the dock leasing program. Agreed Statement of Facts. 102 Wn.2d at 664 (Pet. A-8).

[20] 89 L. Ed. at 837.

Respectfully submitted this 25 day of November, 1987.

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